Filed 9/16/03 In re O. W. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re O.W., a Person Coming Under the Juvenile Court Law.	B161820 (Los Angeles County Super. Ct. No. J 973077)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. OSCAR W., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County. W. Zeke Zeidler, Referee. Reversed and remanded in part; affirmed in part.

Kate M. Chandler, under appointment by the Court of Appeal for Appellant Oscar W.

Lloyd W. Pellman, County Counsel, Robert Stevenson, Principal Deputy County Counsel for Respondent.

Oscar W. (Father), the father of six-year-old O. W., appeals an order of the dependency court granting guardianship of O. to her non-relative foster parents, and two visitation orders limiting Father's visitation with O. Father contends the dependency court erred in failing to consider an aunt for O.'s placement; in placing O. in guardianship with her foster mother; and in granting discretion to third parties to determine when visitation was appropriate. We agree with Father that the visitation orders were in error, but affirm the order placing O. in a non-relative guardianship.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

O. was born in September 1996, and has three half-brothers, Daniel B. (age 15), James M. (age 13), and Christopher M. (age 10). Due to mother Linda W.'s drug use, Daniel and James had previously been in foster care from June 1987 to July 1990, and a subsequent guardianship which was terminated in April 2000. Christopher had also been in foster care due to Linda's drug use from December 1990 to September 1997, when he was returned to her care.

On February 28, 2001, a referral was made alleging that Linda had been leaving the children unattended for hours at a time. Daniel and James had threatened to run away and requested placement, but Christopher and O. denied any problems. Mother's apartment "was consistent with the allegations of drug use in that it was in disarray," and Mother tested positive for PCP. The minors were detained and a section 300 petition was filed March 16, 2001, alleging that Mother had physically abused the minors.

Mother expressed a preference for placing the children with their aunt, Sylvia M. Christopher stated that he wanted to live with his aunt, but her name was Sonia. He identified Sylvia in the DCFS reception room as "Ree" and stated she was not his aunt, and he definitely did not want to live with her. O. stated that she knew Ree and did not want to live with her.

At the time of the jurisdictional hearing held April 23, 2001, the report noted that Father was incarcerated for corporal injury to a spouse. In an interview, Mother told the

social worker that Father had hit her and she had to get 10 stitches over her eye. The report noted that Sylvia had expressed an interest in caring for Christopher and O. A social worker had visited Sylvia's home, a three-bedroom, two-bath home which she shared with her husband Elbert M. Sr., a daughter Regina, and son Elbert Jr. The house was undergoing remodeling. Sylvia was employed as a nursing assistant at a Veteran's Administration Hospital, and Elbert Sr. was employed as a longshoreman. If the children were placed in the home, Christopher would stay in Elbert Jr.'s room and O. would stay in Regina's room on rollaway beds. Regina was pregnant and was due in May 2001. The live scan report for Sylvia, Elbert Jr. and Regina was negative. However, Elbert Sr. had a conviction for theft in 1972, and arrests for petty theft and driving under the influence in 1973, which would prohibit placement in the home pursuant to Welfare and Institution Code section 361.4.[1] A state exemption to allow placement was being pursued.

The interim report dated July 3, 2001, indicated that Christopher and O. remained placed together in foster care. Father obtained a release from custody to appear at the continued adjudication and disposition hearing held August 20, 2001. Mother was denied reunification, and the court set a section 366.26 selection and implementation hearing.

A status review report prepared for the February 19, 2002 hearing indicated that James, Christopher and O. were residing with foster mother Greta S.; Daniel was having trouble in his current foster placement and was replaced with Jackie F. The social worker again visited Sylvia's home in January 25, 2002, to complete a home assessment, and found although the house was a three-bedroom, there was an adult staying in each bedroom. Licensing issues preclude a child over two from staying in a room with an adult. However, the home otherwise appeared appropriate. At the hearing, the court

[1] Unless otherwise indicated, all further references are to the Welfare and Institutions Code.

ordered DCFS to investigate placing all the minors together, and deferred findings for a permanent plan pending the section 366.26 hearing.

The report prepared for the section 366.26 hearing reported that Greta and her husband were willing to take all four children. The social worker had attempted to have Sylvia establish a relationship with O. "due to the fact minor refused to live with her." Because O. did not know who Sylvia was, the social worker asked Sylvia to start visiting O. The social worker believed it would be devastating to take O. from a placement with her siblings and place her with someone she did not even know. The social worker believed more time was needed to evaluate the relationship.

Prior to the hearing, Father submitted a letter to the court in which he advised the court that he was having trouble getting visitation for Sylvia. Father expressed a desire to reunify with O. when he gets out of prison. At the April 16, 2002 hearing, the matter was continued for an adoptive home study. The interim review report prepared for the continued hearing indicated that James, Christopher and O. were residing with Greta S. and Daniel was in a group home. Greta expressed an interest in guardianship for Christopher and O.

James was hitting Christopher and teasing O. about bedwetting. Greta told the social worker James did not respect her. James was seeing a therapist, and James was "slowly getting better." O. told the social worker she "gets tired of Christopher and James's disputes, but loves them both." O. also told her therapist that Father hit her one time and left a bruise. When the social worker mentioned Father to O., she observed that O. got nervous. Father had been writing O., and the letters were being routed through the therapist so they could be presented in a therapeutic setting. O. had been seeing a therapist on a weekly basis and had been referred to a psychiatrist for treatment of her enuresis and possible depression. Greta reported no history of mental illness or substance abuse. Greta had a 10-year-old daughter with her live-in companion and two adult children. Her live scan disclosed an arrest for social security fraud, but no conviction.

DCFS proposed legal guardianship as the permanent plan for Christopher and O. Long-term foster care was recommended for James and Daniel due to behavior problems. The children had expressed their opinion that they did not want to be adopted and that they wanted to remain together as a sibling group. The ChildNet Youth and Family Services Quarterly Progress Report for O. dated June 13, 2002, stated that O. was allowed once a week monitored visits with her aunt Sylvia, but that Sylvia had not contacted the agency or the foster parents for a visit this quarter.

At the August 20, 2002 hearing, Sylvia advised the court that she had called the social worker two or three times for visits, but no one had returned her calls. Neither O. nor Christopher had established a relationship with Sylvia. The matter was trailed to the next day, at which time Father testified that he preferred Sylvia to be O.'s guardian. Father had been sending letters to O. through her social worker. Father had not met Greta, but believed Sylvia would be a better guardian. O. knew Sylvia as "Auntie Ree." Father believed that O. knew who Sylvia was. The department had obtained waivers for the previous convictions at Sylvia's home. Although the department sought to establish a relationship between Sylvia and O., and the court found the department attempted to arrange visits, Sylvia did not take advantage of them. The court found it was in O.'s best interests that guardianship be granted.

At the conclusion of the August 20, 2002 hearing, the court ordered that Father was to have monitored contact with O. "if requested by O." The matter was continued pending receipt of guardianship paperwork, and at the continued hearing, the court ordered O. and Christopher placed in a guardianship with Greta. An order entered after a September 20, 2002 hearing provided that "Christopher and O. may have visitation with their parents as deemed by the legal guardian to be in their best interest."

DISCUSSION

A. Father Has Standing to Contest the Relative Placement Issue.

The Department argues that Father does not have standing to raise the issue of whether the dependency court erred in failing to consider Sylvia for relative placement, on the grounds that a parent lacks standing to contest custody or visitation orders concerning a relative. Standing does not exist where an order does not affect a party's own rights; here, the decision affected Sylvia and O., not Father. (*In re Gary P.* (1995) 40 Cal.App.4th 875; *In re Daniel D.* (1994) 24 Cal.App.4th 1823.) Father argues that the standing rule does not apply here because he has the right to appeal the permanent plan and the placement order is part of the plan. He also argues that because he has not lost his parental rights, all of the Department's standing cases are distinguishable. It is possible that after release from prison, he may request more visitation or custody pursuant to a section 388 petition.

A parent cannot raise issues on appeal which do not affect his or her own rights. (*In re Devin M.* (1997) 58 Cal.App.4th 1538, 1541.) A parent's interest is in reunification. (*Ibid.*) Generally, parents cannot challenge placement orders or visitation orders that involve other persons. In *In re Gary P., supra,* 40 Cal.App.4th 875, the mother appealed an order terminating her parental rights and placing her children up for adoption. She contended the adoption would sever ties with the children's maternal grandmother. (*Id.* at p. 876.) The court found no standing existed because the mother was not aggrieved by the order severing the *grandmother's* ties with the minors. "'[A]n appellant cannot urge errors which affect only another party who does not appeal.'" (*Id.* at p. 877.) In *In re Frank L.* (2000) 81 Cal.App.4th 700, the minor was placed with his paternal aunt and the mother argued separating him from his siblings was not in his best interests. (*Id.* at p. 701.) The court found no standing because the mother was not aggrieved by a ruling which affected the child. A parent's interest in his or her relationship with the minor is separate from the interest of siblings or other relatives in

their relationship with the minor. "[A] parent has no standing to raise an issue relating to the minor's right to visit his siblings." (*Id.* at p. 703.)

We agree with Father that he has standing to appeal the propriety of the guardianship order on the basis that his parental rights have been not been terminated. Prior to termination of parental rights, Father's interest in a potential reunification will be affected by whether O. is placed with a relative or whether she is in guardianship with a former foster parent. The interest to be protected here is the continuity of Father's relationship with O., not the continuity of some other person's relationship with O. (Cf. *In re Gary P., supra,* 40 Cal.App.4th at p. 876 [mother could not appeal order on grounds it affected grandmother's rights]; *In re Joel H.* (1993) 19 Cal.App.4th 1185, 1196 [great aunt who was de facto parent had standing].)

B. The Visitation Orders Were in Error Because They Left Discretion to Determine Visitation with the Minor and Her Guardian.

Father contends that the dependency court improperly delegated visitation decisions to O. and to Greta through the two inconsistent orders made at the August 20, 2002 hearing and at a later September 20, 2002 hearing. Father contends the juvenile court may not give unfettered discretion to a minor or guardian to determine visitation. (*In re Donnovan J.* (1997) 58 Cal.App.4th 1474, 1476 [private individual may not have complete discretion to determine visitation]; *In re Julie M.* (1999) 69 Cal.App.4th 41, 48-49 [minor may not have unfettered discretion to determine visitation].) The Department concedes this point.

We agree. The dependency court has the power and responsibility to regulate visitation between dependent children and their parents. (*In re Donnovan J., supra,* at p. 1476.) However, a court may not delegate its discretion to determine whether any visitation will occur, although it may delegate decisions concerning the time, place, and manner of visitation. (*In re Randalynne G.* (2002) 97 Cal.App.4th 1156, 1164.) Within guidelines established by the court, the Department may exercise flexibility in managing visitation. (*In re Donnovan J., supra,* at p. 1476.)

Thus, delegation to a therapist raised concerns because a therapist, unlike the Department, is not statutorily bound "to act as a cooperative arm of the juvenile court." (*In re Chantal S.* (1996) 13 Cal.4th 196, 213.) However, because the therapist in *Chantal S.* was only given the power to "facilitate" visitation, this did not constitute an unlawful delegation of judicial power. (*Id.* at pp. 213-214.) In *Donnovan J.,* however, the father had no visitation rights unless the therapist gave permission, which was improper. (*In re Donnovan J., supra,*7 Cal.App.4th at p. 1477.) "Although a court may base its determination of the appropriateness of visitation on input from therapists, it is the court's duty to make the actual determination." (*Id.* at p. 1478.) In *In re Julie M., supra,* 69 Cal.App.4th 41, the children were given authority to determine whether their mother could visit them. In so doing, the court "essentially delegated judicial power to the children." (*Id.* at p. 49.) However, *Julie M.* pointed out that the children's input could appropriately be sought in the context of the department's administration of visitation. (*In re Julie M., supra,* at pp. 50-51; see also *In re Danielle W.* (1989) 207 Cal.App.3d 1227, 1237.)

The task of fashioning an appropriate visitation order was discussed *In re Moriah T.* (1994) 23 Cal.App.4th 1367, 1378, which pointed out that "[b]ecause the period of juvenile court jurisdiction is designed to be relatively brief, the effectiveness of a family plan, including visitation, depends on the resources and flexibility of the agency charged with its implementation and supervision." Stressing this need for flexibility and the fact the dependency court itself could not, as a practical matter, oversee the practicalities of visitation, *Moriah T.* reiterated that the frequency and length of the visits were aspects of the time, place and manner of visitation, and an order was proper where it "contemplate[d] that [the parent] would visit the minors regularly, at times, in places, and in a manner consistent with the well-being of the minors." (*Id.* at p. 1377.)

Here, both of the dependency court's orders violated the prohibition on delegation of authority over visitation by delegating that authority to exclusively to Greta and/or O.[2] Thus, these visitation orders are reversed and the dependency court is directed to enter new orders concerning Father's visitation with O.[3]

C. Relative Placement Preference Issues.

1. Independent Assessment of Sylvia for Relative Placement.

Father contends the dependency court erred in failing to independently assess Sylvia for relative placement. He contends her requests for visitation were ignored and the Department did not explain to her how to arrange visitation; the Department mistakenly thought a 30-year conviction for theft was a bar to placement; and the number of bedrooms in her home was insufficient as O. could not be in the same room with an adult.[4]

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[2] Father also argues that there was no basis to find that visitation with her father was detrimental to O. Although the court granted visitation and we therefore see no factual basis for this argument in the first instance, Father bases it on his belief the dependency court limited visitation because O. did not want a visit with her father and reunification services had ended. Because Father has been incarcerated and has a limited relationship with O., some limitations on his visitation are appropriate; this does not mean the court found visitation was *detrimental* to her well-being.

[3] We note that this issue is currently pending before the California Supreme Court in *In re S.B.*, review granted Jan. 22, 2003, S 112260 and *In re J.H.*, review granted July 16, 2003, S. 116644. In both cases the issues are whether the juvenile court must make a specific finding regarding parental visitation after a legal guardian is appointed for a child under Welfare and Institutions Code section 366.26 subdivision (c)(4), or may the court delegate visitation decisions to the guardian? The second issue is whether the validity of the trial court's visitation order can be challenged on appeal in the absence of an objection to that order in the trial court.

[4] On this last factual impediment, Father reads too broadly the court's statement that the latter two problems arose because it was "before [the court] was trained on DCFS's policies and protocols and learned that [it] is not an issue that needs a state waiver. That's an issue that the department has discretion to provide an exemption on or an exception for." This statement applies to the 30-year conviction, not the number of bedrooms or the presence of an adult in the bedroom; indeed, Father cites no authority for

Section 361.3, subdivision (a), provides that "[I]n any case in which a child is removed from the physical custody of his or her parents pursuant to Section 361, preferential consideration shall be given to a request by a relative of the child for placement of the child with the relative." This provision is interpreted to mean that the relative seeking placement shall be the first considered and investigated. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 320.)

The record demonstrates the dependency court did not err, and rather that Father overstates the impact of the problem with the 30-year conviction, the bedroom arrangement, and lack of visitation. Sylvia's home was investigated on two occasions. When it was discovered the old convictions of her husband could be waived by the Department, that step was taken, and everyone in the house passed a live scan. Nothing in the record indicates the bedroom arrangement problem was resolved. Lastly, blame for the lack of visitation falls as much on Sylvia as it does on the Department. Sylvia made a lackluster two or three phone calls; she did not write follow-up letters, seek to speak to the social worker's supervisors, or to take any further steps to insure visitation. We believe she can do more than "advise the social worker and wait to be called on," and cannot condone her passive conduct in this instance. On this record, we find adequate efforts were made to consider her home for relative placement.

2. Substantial Evidence Supports Guardianship.

Section 361.3, subdivision (a) also requires the court, in determining whether relative placement is appropriate, to consider numerous factors, including the best interests of the child, taking into account special psychological, emotional, medical, or educational needs; the wishes of the parent, child, and relative, if appropriate; placement of siblings or half-siblings in the same home; the moral character of the relative and any

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the position the bedroom arrangement is *not* an issue. On the other hand, the 30-year conviction did not require a state waiver but could be handled by DCFS. (See generally section 361.4.)

other adults in the home; the nature and duration of the relationship between the child and the relative; and the ability of the relative to properly care for the child. (§ 361.3, subd. (a).) Section 361.3, subdivision (a) requires the dependency court to exercise its independent judgment, rather than merely review the Department's decision for an abuse of discretion. (*Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023, 1033.)

Father argues that substantial evidence does not support the placement of O. with Greta. He points to the unstable sibling relationships of O. and her three half-brothers and that O. suffers from depression and enuresis, which the court did not address in her placement.

We disagree. At the time of the hearing, O. had been with her current placement for a year and a half; did not know her Aunt Sylvia (Ree) very well, expressed a preference for remaining where she was; had not yet visited with Sylvia on any continuing basis; and in her current placement, she resided with a half-sibling. It appears the lack of visitation is as much the fault of Sylvia, who made a feeble attempt to visit O. On the other hand, Father does not elaborate on how the unstable sibling relationships affected O.'s placement, or how her health and emotional problems would have been better addressed with a placement at Sylvia's home. On the record before us, substantial evidence supports the court's guardianship order.

DISPOSITION

The orders regarding visitation are reversed and the matter is remanded for the entry of a new visitation order consistent with this opinion. The order of guardianship placing O. with Greta is affirmed.

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MUÑOZ (AURELIO), J.*

We concur:

PERLUSS, P. J.

JOHNSON, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.